

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND NATIONAL CONSTITUTIONAL REORDERING

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In *The Identity of the Constitutional Subject*, Michel Rosenfeld reflects on the potential for forms of robust constitutionalism to develop beyond the nation-state.¹ International regimes, he insists, are qualitatively different from states in this regard. The former engage in functionally specific “governance,” rather than in sovereignty-based “government.”² As important, relative to long-established nation-states, the agents of transnational constitutionalism typically confront more material, ideological, and religious diversity than do those who would seek to construct or transform national constitutional identities. In the international realm, because “there seems to be nothing akin to the bonds of the national identity,” the “possibility of a transnational constitutional identity . . . remains very much in question.”³ Nonetheless, Rosenfeld argues, something akin to constitutionalism at the transnational level has appeared in Europe—at least in the rights domain. The outcome partly depends on the fortunes of “rights patriotism,” an ideological movement whose force has expanded as the norms and practices of adjudicating fundamental rights have converged since the 1950s in Europe and elsewhere.⁴

Here I will argue that the European Convention on Human Rights (ECHR, or, the Convention) is, in fact, quickly evolving into a transnational constitutional regime.⁵ The evidence in support of this claim is partly provided by how the regime operates after its transformation through Protocol No. 11. With Protocol No. 11, which entered into force on November 1, 1998, all of the High Contracting Parties accepted

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¹ MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY* 243–80 (2010).

² *Id.* at 244.

³ *Id.* at 248.

⁴ *Id.* at 267.

⁵ Alec Stone Sweet, *Sur la constitutionnalisation de la Convention européenne des droits de l'homme: Cinquante ans après son installation, la Cour européenne des droits de l'homme conçue comme une Cour constitutionnelle* [On the Constitutionalization of the Convention: The European Court of Human Rights as a Constitutional Court], 80 *REVUE TRIMESTRIELLE DES DROITS DE L'HOMME* 923 (2008) (Fr.).

the unfettered right of individuals to petition the European Court. Evidence is also provided by the impact of the incorporation of the ECHR into national legal orders (Part II).⁶ Today, in Rosenfeld's terms, the ECHR and national constitutional rights are increasingly "integrated": they complement and overlap one another.⁷ In my view, the regime's judicial organ—the European Court of Human Rights, or, the Court—not only functions as a "constitutional court," it is today the single most important rights-protecting court in the world.

I. A CONSTITUTIONAL REGIME

Protocol No. 11 confers upon the Court compulsory jurisdiction over applications by individuals who claim a violation of Convention rights, once their national remedies have been exhausted. If the Court finds a violation, it may award monetary damages. Unlike a national constitutional court, however, the Court has no authority to invalidate a national norm that conflicts with the Convention. Put differently, the Court does not exercise direct authority within national legal orders. In the 1970s, when states could still opt out of compulsory jurisdiction, the regime received only 163 individual petitions, rising to 455 in the 1980s. Under Protocol No. 11, the number of petitions exploded. In 1999, the Registry of the Court received 8400 complaints, a figure that has increased every year since, to 61,300 applications in 2010. Although some ninety-six percent of all petitions will be ruled inadmissible for one reason or another, the Court is overloaded. The annual rate of judgments on the merits shows the same trend. Through 1982, the Court had issued, in its history, only sixty-one full rulings pursuant to applications by individuals. In 1999, it rendered 250 fully reasoned judgments on the merits, 1200 in 2005, and 2607 in 2010.⁸ Under Protocol No. 11, the European Court is the most active rights-protecting court in the world.

A. Governance Functions

As Rosenfeld notes, all constitutional regimes, whether transnational or national, "share . . . [a] commitment to the three essential components of [contemporary] constitutionalism: limitation of powers;

⁶ See A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (Helen Keller & Alec Stone Sweet eds., 2008).

⁷ ROSENFELD, *supra* note 1, at 255.

⁸ Annual statistics are reported on the Court's website. See *Statistical Information*, EUR. CT. HUM. RTS., <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data> (last visited Mar. 24, 2012).

adherence to the rule of law; and protection of fundamental rights.”⁹ A robust system of protecting fundamental rights tends to subsume how the other two components are defined. The ECHR regime is truly pan-European, covering forty-seven states with a population exceeding 800 million people. Its *raison d'être* is to reinforce national constitutionalism, as just defined. More specifically, the Court performs three governance functions: it renders justice to individual applicants, beyond the state (a justice function); it supervises the respect for fundamental rights on the part of state officials, including judges (a monitoring function); and it determines the scope and content of Convention rights, in light of state practice (an oracular, or lawmaking, function). The Court regards the ECHR as a type of transnational constitution,¹⁰ but it does not exercise sovereignty within national orders. The Court's case law gains influence domestically only through the complicity of national officials.

Why did the states negotiate and ratify Protocol No. 11, knowing that the reform would radically enhance the authority of the Court to perform its functions? I would emphasize two major factors. First, after World War II, Western Europe became the epicenter of a “new constitutionalism,” which, with successive waves of democratization, spread across the continent. This development broadly corresponds to the emergence of Rosenfeld's concept of “rights patriotism,” a movement that places rights at the very core of constitutionalism. The older national “constitutional models” that Rosenfeld so well describes in chapters 5 and 6 of his book are effectively altered to accommodate a privileged place for rights protection. Legislative sovereignty, in its traditional guise, is steadily overthrown, and constitutional judicial review of the type institutionalized in Germany and Spain becomes the taken-for-granted, best-practice standard. The Court richly benefits from these changes, allowing it to operate in a relatively permissive environment.

Second, the Soviet bloc collapsed. In the 1990s, with constitutional reconstruction in full swing, the European Union (EU) and the Council of Europe offered admission to post-communist states on the basis of certain conditions, including a commitment to rights protection. Locking them into the ECHR and placing them under the supervision of its Court was an obvious means of securing that commitment. In fact, the ECHR has played a crucial role in democratic transitions in post-communist Europe.¹¹ States modeled their new bills of rights on the

⁹ ROSENFELD, *supra* note 1, at 269.

¹⁰ The Court has itself called the ECHR “a constitutional instrument” of European public law. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 27 (1995).

¹¹ See THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN CENTRAL AND EASTERN EUROPE (Leonard Hammer & Frank Emmert eds., 2011); TRANSITIONAL JURISPRUDENCE AND THE ECHR: JUSTICE, POLITICS AND RIGHTS (Antoine Buyse & Michael Hamilton eds., 2011).

ECHR, with an eye toward future membership in the EU and the Council of Europe; many even signed the ECHR prior to ratifying new constitutions (including Albania, Armenia, Azerbaijan, Georgia, Poland, Slovakia, and Ukraine). For the core states of Western Europe, folding the post-communist states into the ECHR also fulfilled strategic interests. Protocol No. 11 made the regime an extraordinarily efficient mechanism for monitoring the internal politics of states that still posed serious threats to the stability of Europe as a whole. For western states, the cost of Protocol No. 11 is enhanced supervision of their own rights-regarding activities, a tax they have thus far been willing to pay. In today's system there is virtually no state norm or decision that is immune from judicial review.

B. *Adjudicating Rights*

The European Court has steadily raised standards of rights protection under the Convention (the oracular, lawmaking function). This process has routinely placed states, including powerful ones, in non-compliance with the Convention, all but requiring them to upgrade national rights protection.¹² This fact is in tension with the view that a system of enforcing international human rights can lead only to "rights minimalism": given the great diversity of national traditions, lowest-common-denominator outcomes are "the best we can hope for."¹³ Rosenfeld also takes a minimalist position,¹⁴ most notably in his discussion of the European Court's "margin of appreciation" jurisprudence. The Court uses the margin of appreciation doctrine, he suggests, to justify giving deference to states when they abridge an individual's rights, not least to preserve values that are essential to their national identity.¹⁵ Most Convention rights are, in fact, "qualified" by an express limitation clause: rights can be infringed by states when "necessary" to achieve some designated public interest. Rosenfeld characterizes the margin of appreciation as an effective "judicial instrument . . . designed to strike the requisite equilibrium between convergence and divergence in the application of the ECHR."¹⁶ I partly disagree with this portrayal.

The master instrument used by the Court to harmonize standards of rights protection across national systems is proportionality analysis

¹² A EUROPE OF RIGHTS, *supra* note 6 (documenting eighteen different states).

¹³ Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?*, 12 J. POL. PHIL. 190, 213 (2004); *see also* MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (2001); MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD (1994).

¹⁴ ROSENFELD, *supra* note 1, at 269–70.

¹⁵ *Id.* at 256–58.

¹⁶ *Id.* at 256.

(PA), which was developed after the early margin of appreciation case law examined by Rosenfeld. PA is tailor-made for the adjudication of qualified rights, and it is the crucial mechanism of coordination in the ECHR regime.¹⁷ The Court uses PA to adjudicate virtually all Convention rights, and it insists that all national courts use it as well.¹⁸ In the standard sequence, once a judge determines that a right is in play, she then verifies that the measure under review: (a) was lawful under national law; (b) was properly designed to achieve a stated purpose (means are rationally related to ends); and (c) does not infringe more on the right than is *necessary* to achieve objectives (a test for least-restrictive alternatives). The European Court often uses this last stage to balance, insofar as the Court weighs the cost to the right-claimant against the public benefits of the measure, in light of the facts. Thus, how any qualified right is actually enforced will always be contingent upon local conditions, and the state that has infringed upon a right always bears the burden of justifying the necessity of the chosen means.

The Court uses PA, in part, to determine how much discretion—the size of the “margin of appreciation”—states possess in any domain governed by the ECHR. In practice, the Court infuses the analysis with a simple comparative method for determining when “new” rights have emerged in the system, or when the scope of existing rights merits expansion. The Court will typically raise the standard of protection in a given domain when a sufficient number of states have withdrawn public-interest justifications for restricting the right. The margin of appreciation thus shrinks as consensus on higher standards of rights protection emerges within the regime, shifting the balance in favor of future applicants. The move puts laggard states out of compliance. Nonetheless, the Court can claim that there is an external, “objective” means of determining the weights to be given to the values in conflict, and the Court’s supporters can usually assert that the Court’s bias is majoritarian, transnational, and prorights. A state that would choose not to comply is left to defend a lower standard of rights protection, on idiosyncratic or nationalistic grounds, which would be counter to a wider “rights patriotism.”

While I would stress that (as a formal, doctrinal matter) the margin of appreciation is now the product of PA, Rosenfeld could rightly point to a number of high-profile cases in which the Court appears to deploy its deference doctrine to avoid taking politically controversial deci-

¹⁷ See Mattias Kumm, *Constitutional Rights As Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. L. 574 (2004); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 73, 151 (2008).

¹⁸ See *Smith & Grady v. United Kingdom*, 1999-VI Eur. Ct. H.R. 45 (1999).

sions.¹⁹ The fact that the margin of appreciation doctrine is, at times, deployed strategically in this way may, in fact, help to explain the Court's extraordinary success in raising standards of rights protection more generally.

II. THE ECHR AND NATIONAL LEGAL ORDERS

In 1955, when the Convention entered into force, Ireland was the only Contracting Party to the ECHR with any meaningful experience with the judicial protection of fundamental rights. The constitutions of Belgium, France, Luxembourg, the Netherlands, and the United Kingdom either did not contain such rights, or they denied the judiciary the authority to review the legality of statutes. The German and the Italian constitutional courts, newly born, were not yet operating. It is hardly surprising, therefore, that a majority of signatory states rejected proposals to give individuals an automatic right of petition, and to make the jurisdiction of the European Court compulsory. Today, legislative sovereignty in Europe has been virtually extinguished, and rights review—either under the constitution, the ECHR, or both—is the norm.

A. *Incorporation*

Over the last two decades, in a process that accelerated after the entry into force of Protocol No. 11, all state parties to the ECHR incorporated the ECHR into domestic legal orders.²⁰ Domestication proceeded via different routes: express constitutional provision (some post-communist states); judicial interpretation of constitutional provisions not mentioning the ECHR (most states in Western Europe); or special statutes (United Kingdom, Ireland, and Scandinavia). With incorporation, all national courts in the system are capable of enforcing the Convention: individuals can plead the ECHR at national bar; judges are under a duty to identify statutes that conflict with Convention rights; and high courts may refuse to apply statutes that conflict with Convention

¹⁹ *E.g.*, *Lautsi v. Italy*, No. 30814/06 (2011), http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v_italy.pdf (denying a claim that crucifixes hung in Italian public schools violate freedom of religion); *A, B, & C v. Ireland*, No. 25579/05 (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=878721&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (permitting the prohibition on abortions on grounds of health and well-being).

²⁰ The most complete scholarly treatments of incorporation are *A EUROPE OF RIGHTS*, *supra* note 6, and *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN CENTRAL AND EASTERN EUROPE*, *supra* note 11.

rights, with the notable exception of those in the United Kingdom and Ireland.

Incorporation is an inherently constitutional process. The Convention has developed into a “surrogate” constitution in every state that did not possess its own judicially enforceable charter of rights (including Belgium, France, the Netherlands, Switzerland, and the United Kingdom). Finland, Norway, and Sweden enacted new bills of rights, closely modeled on (and invoking) the ECHR, in order to fill gaps in their own constitutions. In those states that possess, at least on paper, relatively complete systems of constitutional justice, incorporation provides supplementary protection. We find this situation in Germany, Greece, Ireland, Italy, Portugal, Spain, Turkey, and in the post-communist states. To take an important example, the Spanish Constitutional Tribunal enforces the ECHR as a set of quasi-constitutional norms.²¹ The Tribunal will strike down statutes that violate the Convention as per se unconstitutional; it interprets Spanish constitutional rights in light of the ECHR, wherever possible; and it has ordered the ordinary courts to abide by the Strasbourg Court’s jurisprudence as a matter of *constitutional* obligation, including case law generated by litigation not involving Spain. If the judiciary ignores the Court’s jurisprudence, individuals can appeal directly to the Tribunal for redress. The German Federal Constitutional Court has recently taken a step in this direction.²² In many post-communist states, as well, constitutional judges invoke the Strasbourg Court’s jurisprudence as authority, in order to enhance the status of fundamental rights—and hence their own positions—in the national constitutional order.

Most states have conferred onto the ECHR supralegislative but infraconstitutional rank. Strikingly, some states have given the Convention constitutional rank (e.g., Albania, Austria, and Slovenia) and, in the Netherlands, the ECHR enjoys supraconstitutional status. In Belgium, the Constitutional Court has determined that the ECHR possesses supralegislative but infraconstitutional rank, whereas the Supreme Court has held that the ECHR possesses supraconstitutional status, thereby enhancing its autonomy vis-à-vis the Constitutional Court. The Belgian example is an outcome of a structural condition produced by incorporation, which I call “rights pluralism.”

²¹ Mercedes Candela Soriano, *The Reception Process in Spain and Italy*, in A EUROPE OF RIGHTS, *supra* note 6, at 393.

²² Frank Hoffmeister, *Germany: Status of European Convention on Human Rights in Domestic Law*, 4 INT’L J. CONST. L. 722 (2006).

B. *Rights Pluralism*

Rosenfeld rightly contrasts the traditional model of the national constitutional system, which is relatively “cohesive, unified, [and] hierarchically ordered” in order to maximize “formal convergence among all diverse elements and interests,” with the transnational one, wherein “there is no comparable hierarchy or unity.”²³ In practice, one assumes that a constitutional court (under rights-based constitutionalism) or a parliament (under a regime of legislative sovereignty) possesses the “final word” on questions involving the validity of, or conflict among, legal norms within the system.

The potential for national constitutional hierarchy and unity to be undermined is nonetheless great in all states that incorporated the ECHR in ways that made Convention rights—and the Court’s precedents—directly enforceable by national judges against conflicting statutes. In such cases, incorporation destroyed the prohibition of judicial review, while establishing “rights pluralism.” Rights pluralism refers to any situation in which two or more sources of judicially enforceable rights coexist. In such situations, litigants have a choice of which right to plead, and judges can choose which right to enforce.

Rights pluralism has fundamentally reconfigured national constitutional law, both substantively and with respect to how courts interact with legislators, administrators, and one another.²⁴ Many judges will now refuse to apply law that conflicts with the Convention; at the same time, they are abandoning the methods of statutory interpretation traditionally derived from legislative sovereignty. Instead of seeking to discern legislative intent, judges increasingly favor the purposive construction of statutes in light of fundamental rights jurisprudence. In systems in which multiple, functionally differentiated high courts coexist (the majority of states), pluralism means that the supreme courts of ordinary jurisdiction are likely to evolve into *de facto* constitutional courts whenever they review the *conventionality* of statutes. To the extent that they do so, the monopoly of the constitutional court to determine the conditions under which judges may refuse to apply statutes will have been destroyed.

To illustrate, France was once dogmatically attached to the prohibition of judicial review of statutes; today rights pluralism means that it

²³ ROSENFELD, *supra* note 1, at 248.

²⁴ Mads Andenæs & Eirik Bjørge, *National Implementation of ECHR Rights: Kant’s Categorical Imperative and the Convention* (Univ. of Oslo Faculty of Law Legal Studies Research Paper Series, No. 2011-15, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818845.

has three rights-protecting high courts. Indeed, from the point of view of the rights-claimant, the Supreme Civil Court (*Cour d'assation*) and the Council of State (the supreme administrative court) function as the “real” constitutional courts, and litigants and judges treat the Convention as the “real” charter of rights. Individuals, after all, have no direct access to the Constitutional Council; and it is the ECHR, not the Constitutional Council, that supervises the rights-protecting activities of the civil and administrative courts. Thus, three autonomous high courts now protect fundamental rights. Convergence cannot be presumed since there is no formal, hierarchy-based means of coordinating rights doctrine, or of resolving conflicts, among these courts. A similar story can be told with respect to Italy.²⁵

More generally, rights pluralism changes the incentives facing judges on high courts. Simplifying a complex topic, there are several basic logics at work. The first is an “avoidance of punishment” rationale: enforcing Convention rights will make the state—in practice, the court of last resort—less vulnerable to censure in Strasbourg. This logic is especially pronounced in national systems that otherwise prohibit the judicial review of statute or do not have a national charter of rights. A second dynamic is embedded in domestic politics. Individuals and NGOs may seek to leverage the ECHR to alter law and policy, and judges may work to entrench Convention rights in order to enhance their own authority with respect to other national organs, including courts. Third, as the CLO gains in effectiveness, the interest high courts have in seeking to influence the evolution of the ECHR increases. Even for a court that is relatively jealous of its own autonomy, constructive engagement is more likely to constrain the Court than the more costly alternatives: defection and open conflict. Each of these dynamics will tend to: (1) enhance the status of the Convention in national legal orders, thereby reinforcing rights pluralism; (2) aid the system as a whole in transcending rights minimalism; and (3) favor the further construction of the beliefs and practices that Rosenfeld associates with the ideology of “rights patriotism.”

CONCLUSION

In Europe, a rights-based, transnational constitutionalism has been consolidated as the ECHR and national systems of constitutional justice have become increasingly embedded. Pan-European constitutionalism

²⁵ Alec Stone Sweet, *Le Conseil Constitutionnel et la Transformation de la République* [*The Constitutional Council and the Transformation of the Republic*], 25 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 65 (2008) (Fr.).

is partly a product of formal, doctrinal features (of incorporation, for example). It is due, in part, to the consequences of rights pluralism on the rights-regarding decisions of judges and other national officials. With very few exceptions, every judge in Europe is now positioned to enforce Convention rights in the domestic order. These claims are empirical. I have not argued a normative position. Europe may or may not be better off by enhancing the authority of judges to enforce fundamental rights. Further, the overall system only imperfectly protects rights; the European Court, after all, is activated by the inadequacies of national protection. Nonetheless, if current trends continue, a set of profound normative issues will be impossible to avoid. As Rosenfeld emphasizes, the traditional model of constitutional unity and sovereignty has provided basic materials for defending rights constitutionalism at the national level. In my view, this model is rapidly disintegrating, while there is no clear replacement in sight. As a result, the political legitimacy (and viability) of the emergent, multilevel system of protecting rights in Europe—one dominated by judges and interjudicial dialogue, rather than by elected officials—remains, as Rosenfeld has suggested, “very much in question.”²⁶

²⁶ ROSENFELD, *supra* note 1, at 248.